

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CURT BAGLEY and SANDRA BAGLEY,
husband and wife and the marital community
comprised thereof,

Plaintiff,

v.

TRAVELERS HOME AND MARINE
INSURANCE COMPANY,

Defendant.

No.: 2:16-cv-00706-JCC

DEFENDANTS MOTION TO QUASH
AND FOR A PROTECTIVE ORDER

NOTED ON THE MOTION CALENDAR:
JUNE 17, 2016

I. CONFERRAL

The parties have conferred on the issues that the subject of this motion and
unfortunately have been unable to resolve their differences.

II. RELIEF REQUESTED

Defendant Travelers Home and Marine Insurance Company (“Travelers”) moves the
Court to enter an order quashing and/or a protective order against the subpoena and notice of
deposition of Lloyd Bernstein, defense counsel for Travelers and the subpoena and notice of
deposition of Lisa Cronin, in-house counsel for Travelers, and holding that Ms. Cronin has
no obligation to produce privileged documents sought in the subpoena issued to her.

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III. INTRODUCTION

This case arises out of damage to plaintiffs' dock in Ferndale, Washington in November 2015. Plaintiffs made a claim under their homeowners policy issued by Travelers, Policy Number 990362148 633 1 (the "Policy"). After investigating the claim, Travelers denied coverage for the claim. Plaintiffs filed a Complaint in state court, and Travelers subsequently removed to this Court.

On May 26, 2016, plaintiffs served Travelers with notices of deposition and subpoenas to depose Lloyd Bernstein, defense counsel for Travelers, and Lisa Cronin, in-house counsel for Travelers. Declaration of Lloyd Bernstein in Support of Defendant Travelers' Motion to Quash and for a Protective Order ("Bernstein Decl.") at ¶¶ 2-3, Ex. A-B. Travelers moves for the Court to enter an order of the Court quashing those subpoenas or otherwise enter a protective order forbidding the depositions of Mr. Bernstein and Ms. Cronin. FRCP 45(d)(3)(A) provides, "On timely motion, the court for the district where compliance is required must quash or modify a subpoena that: . . . (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies[.]" "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FRCP 26(c)(1).

IV. ARGUMENT AND AUTHORITY

As a general rule, courts are hesitant to grant protective orders prohibiting a deposition absent extraordinary circumstances. However, a request to depose an opposing party's attorney constitutes a circumstance justifying the departure from the general rule.¹ The Federal Rules of Civil Procedure do not explicitly prohibit the deposition of an opposing party's attorney, but federal courts have held that depositions of attorneys inherently constitute an invitation to harass the attorney and the opposing party, and disrupt and delay

¹ *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84 (M.D.N.C. 1987).

1 the case.² Further, seeking the deposition of counsel adds to the cost of litigation and
2 threatens the attorney-client relationship.³

3 The Ninth Circuit has not specifically addressed the standard or burden to apply
4 where a party seeks to take the deposition of the opposing party's attorney. However, district
5 courts in Washington and most other district courts have followed the three-prong test of
6 *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986).⁴ The *Shelton* court
7 emphasized that because deposing a party's attorney can have such a negative impact on the
8 litigation process, the practice of deposing opposing counsel should only be employed in
9 very limited circumstances.⁵ Depositions of opposing counsel should be limited to
10 circumstances where the party seeking to take the deposition shows:

- 11 (1) no other means exist to obtain the information than to depose opposing
12 counsel;
- 13 (2) the information sought is relevant and non-privileged; and
- 14 (3) the information is crucial to preparation of the case.⁶

15 Under the *Shelton* test, the burden of establishing the right to discovery from
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18 ² *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir.1986); *West Peninsular title Co.*
19 *v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990); *In re Arthur Treacher's*
20 *Franchisee Litigation*, 92 F.R.D. 429, 437 (E.D. Pa.1981); *Walker v. United Parcel Services*,
21 87 F.R.D. 360 (E.D.Pa.1980).

22 ³ *Shelton*, 805 F.2d at 1327.

23 ⁴ See e.g. *Bybee Farms LLC*, *supra*; see also *DiLorenzo v. Costco Wholesale Corp.*, 243
24 F.R.D. 413 (W.D. Wash. 2007); *Lloyd Lifestyle Ltd. v. Soaring Helmet Corp.*, 2006 WL
25 753243, * 1, 2 (W.D. Wash. 2006); *FMC Tech, Inc. v. Edwards*, 2007 WL 836709, * 2, 3
(W.D. Wash. 2007); *Caterpillar Inc. v. Friedemann*, 164 F.R.D. 76, 77 (D.Or.1995); *In re*
Sause Bros. Ocean Towing, 144 F.R.D. 111, 116-17 (D.Or.1991); *Theissen v. General*
Electric Capital Corp., 267 F.3d 1095, 1112 (10th Cir.2001).

26 ⁵ 805 F.2d at 1327.

⁶ *Id.*

opposing counsel is upon the requesting party.⁷ A party's failure of any prong of the three-part test requires the court to grant the motion to quash.⁸

1. The Court Should Quash the Subpoena of Travelers' Defense Counsel, Lloyd Bernstein

Plaintiffs seek to depose Lloyd Bernstein, defense counsel for Travelers. Plaintiffs cannot establish the factors set out in the *Shelton* test for determining whether deposing the opposing party's lawyer is appropriate, and therefore they should be prohibited from deposing Mr. Bernstein.

A. Any information Mr. Bernstein has is available through other means.

Plaintiffs must demonstrate that no means other than deposing Travelers' defense counsel exist to obtain the information they seek.⁹ A deposition of the opposing party's attorney is not required simply because it would be helpful to their case.¹⁰

It is unclear what information plaintiffs are hoping to obtain by deposing Mr. Bernstein, but any information he has is available to plaintiffs' through the usual avenues of discovery. Any factual information that Mr. Bernstein has is available through requests for production of documents or depositions of people actually involved in handling plaintiffs' claim. In fact, plaintiffs deposed Mathew Gjersee, the claims adjuster who handled plaintiffs' claim, on May 3, 2016. Plaintiffs have noticed the deposition of Roopesh Sharma, Mr. Gjersee's direct supervisor, and Roman Cross, the engineer Travelers hired to review the damage and calculate an estimate for repair.

Any information that Mr. Bernstein has is available through the ordinary method of

⁷ *Lloyd Lifestyle Ltd.*, C06-0349C, 2006 WL 753243, at *2.

⁸ *Id.*

⁹ *Shelton*, 805 F.2d at 1328.

¹⁰ *FMC Techs., Inc. v. Edwards*, C05-946C, 2007 WL 836709, at *4 (W.D. Wash. Mar. 15, 2007).

1 discovery – requests for product, interrogatories, requests for admission, and depositions.
2 Plaintiffs must demonstrate why those methods of discovery would fail to lead to the
3 information that they need to prepare their case, leaving the deposition of Mr. Bernstein as
4 their only means to obtain the information that they need.

5 **B. Plaintiffs cannot demonstrate that the information they seek from**
6 **Mr. Bernstein is relevant and non-privileged.**

7 A recent Washington Supreme Court decision, *Cedell v. Farmers*,¹¹ shifted the burden
8 to the insurer to prove that its pre-litigation communications with an attorney are protected
9 by the attorney-client privilege. *Cedell* requires an insurer to disclose documents pertaining
10 to its “quasi-fiduciary” duties—that is, its investigative and claim-handling functions.
11 However, even under *Cedell*, an insurer is not required to produce the privileged advice of its
12 legal counsel.

13 Mr. Bernstein was not retained to represent Travelers until after it was served with
14 plaintiffs’ IFCA Notice and Complaint. Bernstein Decl. at ¶ 4. Therefore, the presumption
15 under *Cedell* that pre-litigation communications between the insurer and its counsel are not
16 privileged does not apply here because Mr. Bernstein did not have any pre-litigation
17 communication with Travelers in this matter. Thus, plaintiffs’ have the burden under the
18 *Shelton* framework to prove that the information they seek to obtain by deposing
19 Mr. Bernstein is relevant and non-privileged. Because Mr. Bernstein became involved in this
20 matter only after litigation had commenced, it is difficult to imagine what information
21 plaintiffs seek that is non-privileged and could not be obtained through other means.

22 **C. Plaintiffs cannot demonstrate that any information Mr. Bernstein has is**
23 **crucial to the preparation of their case.**

24 As the *Shelton* court notes, “The harassing practice of deposing opposing counsel
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26 ¹¹ *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 295 P.3d 239 (2013).

1 (unless that counsel's testimony is crucial and unique) appears to be an adversary trial tactic
2 that does nothing for the administration of justice but rather prolongs and increases the costs
3 of litigation, demeans the profession, and constitutes an abuse of the discovery process.”¹²
4 The fact that taking the deposition of opposing counsel may be helpful, does not make it
5 crucial.¹³ The *Shelton* test “is intended to protect against the ills of deposing opposing
6 counsel in a pending case which could potentially lead to the disclosure of the attorney's
7 litigation strategy. Because this abuse of the discovery process had become an ever
8 increasing practice, this Court erected the Shelton test as a barrier to protect trial attorneys
9 from these depositions.”¹⁴

10 It is plaintiffs’ burden to prove that Mr. Bernstein has information crucial to the
11 preparation to their case and that they have no other way of obtaining it.¹⁵ As with the first
12 prong, plaintiffs cannot satisfy the third prong of *Shelton*, because any information they seek
13 from Mr. Bernstein can be obtained through other sources. In effect, Mr. Bernstein’s
14 deposition is not crucial to the preparation of their case.¹⁶ Accordingly, plaintiffs should be
15 prohibited from deposing Mr. Bernstein.

16 **2. The Court Should Prohibit the Deposition of Travelers’ In-House Counsel,**
17 **Lisa Cronin**

18 Plaintiffs seek to depose Lisa Cronin, Travelers’ in-house counsel. Courts in
19 numerous jurisdictions, including the Western District of Washington, have held that a party
20 seeking to depose the opposing party’s in-house counsel must prove the factors in the *Shelton*

22 ¹² *Shelton*, 805 F.2d at 1330.

23 ¹³ *FMC Technologies, Inc.*, 2007 WL 836709, at *4.

24 ¹⁴ *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730-31 (8th Cir. 2002).

25 ¹⁵ *Lloyd Lifestyle Ltd.*, 2006 WL 753243, at *2.

26 ¹⁶ *FMC Techs., Inc.*, 2007 WL 836709, at *5.

1 test.¹⁷ Plaintiffs cannot establish the factors set out in the *Shelton* test for determining
2 whether deposing the opposing party's lawyer is appropriate, and therefore they should be
3 prohibited from deposing Ms. Cronin.

4 **A. Any information Ms. Cronin may have concerning the investigation is**
5 **available through other means.**

6 Counsel for the defendant, including in-house counsel, should not be required to
7 testify where the information sought is available through other means. For example, where
8 the information sought is available through depositions of non-attorney employees or
9 documents, in-house attorneys should not be required to testify.¹⁸

10 Plaintiffs deposed Mathew Gjersee, the claims adjuster who handled plaintiffs' claim,
11 on May 3, 2016. As the claims adjuster who handled plaintiffs' claim, Mr. Gjersee is the
12 Travelers' employee most knowledgeable about how the claim was handled. Plaintiffs have
13 noticed the deposition of Roopesh Sharma, Mr. Gjersee's direct supervisor, and Roman
14 Cross, the engineer Travelers hired to review the damage and calculate an estimate for repair.
15 Plaintiffs have commanded both Mr. Sharma and Mr. Cross to bring a complete copy of their
16 files relating to the litigation. Any factual information that Ms. Cronin has concerning the
17 investigation of plaintiffs' claim is contained in the claim file, which has been produced. In
18 short, any and all non-privileged information Ms. Cronin has concerning plaintiffs' claims is
19 available through other means.

21 ¹⁷ See e.g., *Busey v. Richland Sch. Dist.*, No. 13-CV-5022-TOR, 2014 WL 1404580, at *1
22 (E.D. Wash. Apr. 10, 2014) (granting motion for protective order to prohibit plaintiff from
23 taking the deposition of defendant's in-house counsel because plaintiff failed to meet the
24 elements of the *Shelton* test); *Bybee Farms LLC v. Snake River Sugar Co.*, No. CV-06-5007-
25 FVS, 2008 WL 820186, at *1 (E.D. Wash. Mar. 26, 2008) (granting motion to quash
deposition notice of defendant's in-house counsel because plaintiff failed to meet the
elements of the *Shelton* test); *Caterpillar Inc. v. Friedemann*, 164 F.R.D. 76, 77 (D.Or.1995)
(granting motion to quash subpoena to senior in-house attorney because defendant failed to
meet *Shelton* test).

26 ¹⁸ *Shelton*, 805 F.2d at 1327.

1 **B. Internal communications between Ms. Cronin and other Travelers’**
2 **employees is protected by attorney-client privilege and is work product.**

3 The attorney-client privilege applies to communications between in-house counsel
4 and lower-level employees in an organization when those communications are made in order
5 to secure legal advice.¹⁹ The purpose of the attorney-client privilege is to encourage candid
6 communications between client and counsel and effective counsel “depends on the lawyer
7 being fully informed by the client.”²⁰ Attorney-client privilege applies in the corporate
8 setting “to protect not only the giving of professional advice to those who can act on it but
9 also the giving of information to the lawyer to enable him to give sound and informed
10 advice.”²¹

11 Under some circumstances, courts will find that attorney-client privilege is waived by
12 implication where a party “takes a position in litigation that makes it unfair to protect that
13 party's attorney-client communications.”²² Plaintiffs have not asserted attorney-client
14 privilege has been waived, and there is no basis upon which to find that it has been waived.

15 Under *Cedell*, the insurer has the burden of proving that its pre-litigation
16 communications with an attorney are protected by the attorney-client privilege. *Cedell*
17 requires an insurer to disclose documents pertaining to its “quasi-fiduciary” duties. Even
18 under *Cedell*, federal courts in Washington have held where an in-house coverage counsel
19 gives advice on coverage liability for a claim, their advice and communications are protected
20 by attorney-client privilege.²³ For example, in *MKB Constructors v. Am. Zurich Ins. Co.*,

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22 ¹⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 394–95, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

23 ²⁰ *Id.* at 395.

24 ²¹ *Id.* at 390-391.

25 ²² *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (internal quotes omitted).

26 ²³ *MKB Constructors v. Am. Zurich Ins. Co.*, C13-0611JLR, 2014 WL 3734286, at *2 (W.D. Wash. July 28, 2014).

1 where the insurer's in-house counsel gave opinions concerning the legal obligations at issue
2 on a given claim, but the claims adjusters made the determination of whether to deny
3 coverage, the communications between the in-house attorney and the claims adjuster were
4 privileged and not subject to production.²⁴

5 Here, even under *Cedell*, any testimony that Ms. Cronin might give is protected by
6 attorney-client privilege. Ms. Cronin was not responsible for the investigation and
7 evaluation of the claim; she did not make decisions regarding the claim; and she did not take
8 any examinations under oath or interview the insured or other witnesses. Declaration of
9 Lisa Cronin at ¶¶ 4-6. In fact, Ms. Cronin did not become involved in this claim until after
10 plaintiffs' served their filed IFCA Notice and Complaint. *Id.* at ¶ 2. Thus, under *Cedell*,
11 Ms. Cronin's communications remain protected by attorney-client privilege.

12 In their notice of deposition and subpoena, plaintiffs command Ms. Cronin to bring a
13 copy of her file relating to this litigation. Any non-privileged documents Ms. Cronin has
14 within her possession have already been produced. To the extent that those documents are
15 protected by attorney-client privilege or work product protection, they have been withheld
16 and noted on the privilege log provided to plaintiffs. Under the *Shelton* test, plaintiffs have
17 the burden of proving that these documents and any testimony Ms. Cronin would give are
18 relevant and non-privileged.

19 **C. Plaintiffs cannot demonstrate that any information Ms. Cronin has is**
20 **crucial to the preparation of their case.**

21 The burden of establishing the right to discovery from opposing counsel is upon the
22 requesting party.²⁵ Under the *Shelton* test, plaintiffs must identify what information
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25 ²⁴ *Id.*

26 ²⁵ *Lloyd Lifestyle Ltd.*, C06-0349C, 2006 WL 753243, at *2.

1 Ms. Cronin has that is crucial to the preparation of their case.²⁶ Because any information
2 sought from Ms. Cronin can be obtained from other sources, it seems unlikely that plaintiffs
3 can demonstrate that she has information crucial to the preparation of their case.

4 Plaintiffs cannot meet any of the prongs set forth in the *Shelton* test. Consequently,
5 plaintiffs should be prohibited from deposing Ms. Cronin.

6 **V. CONCLUSION**

7 Based on the foregoing reasons, Travelers respectfully requests that the Court enter an
8 order quashing the subpoenas or otherwise enter a protective order forbidding the depositions
9 of Mr. Bernstein and Ms. Cronin.

10 DATED: June 9, 2016

11 BULLIVANT HOUSER BAILEY PC

12
13 By /s/ Lloyd Bernstein
14 Lloyd Bernstein, WSB #46244
E-mail: lloyd.bernstein@bullivant.com

15 Attorneys for Defendant Travelers Home and
16 Marine Insurance Company

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25 ²⁶ See e.g. *Bybee Farms LLC*, 2008 WL 820186, at *3 (granting defendant's motion to quash
26 deposition of defendants' counsel because, among other reasons, plaintiffs did not
demonstrate that a deposition of defendant's counsel was critical to the preparation of their
case).

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the counsel listed below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of June, 2016, at Portland, Oregon.

/s/ Lloyd Bernstein
Lloyd Bernstein, WSBA #46244

Of Attorneys for Defendant